92-1468

No. _____

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

Robert F. and Joanne M. Smith

vs.

David Richard Noyes, LLS.

Petition For WRIT OF CERTIORARI TO

THE STATE OF NEW HAMPSHIRE SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

Robert F. Smith, pro se
Joanne M. Smith, pro se
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## QUESTION PRESENTED

1. Should a counter claim interfer with the taking of an appeal by The New Hampshire Supreme Court based on a decision/order of The State of New Hampshire's Board of Licensures For Land Surveyors (hereafter BLS) to dismiss a written complaint against Respondent without notice, and at a reguarily scheduled meeting violate New Hampshire RSA 310-A: 71, which commands, that a formal hearing be held on all written complaints?

2. Did Respondent and the BLS violate Petitioners rights to due process a defined in U.S.C.A. Const. Amends., Amend XIV,[2] and 42 U.S.C.A. Sec. 1983 and 42 U.S.C.A. Sec. 1985 [2][3], when the BLS'S chairman guaranteed a formal

hearing under N.H. RSA 310-A:71?

3. Should New Hampshire R.S.A. 508:4, 508:4 [subd.I] be the standard under the discovery rule for the determination of when a claim accrues under the statutes of limitation based on extrinsic fraud, concealment of material facts and misrepresentation.?

4. Should New Hampshire R.S.A. 508:4, 508:4 [subd.I] be the standard under the discovery rule for the determination of when a claim accrues under the statutes of limitation that Petitioners in the exercise of reasonable diligence and through the legal process, complaint to the BLS, discovered not only that Petitioners had been injured/damaged in

person and property, but that Petitioners injury/damage may have been caused by Respondent.?

5. Does a licensed land surveyor, Respondent, a member of The New Hampshire Land Surveyors Assoc., whose offices are located at Putnam Hall, Thompson School of Applied Science, Univ. of New Hampshire, Durham , N.H. and whose license is granted by the BLS a regulatory authority, New Hampshire R.S.A. 310-A:53 [I], whose "legal duty" is to "safeguard property" in the "public interest" perform his professional duties under color of "State Action?"

6. Should a motion to dismiss be granted when a Petitioners' complaint alleging extrinsic fraud, concealment of material

facts and misrepresentation at a trial, Petition For Quiet Title, 88-E-203, was fully supported by factual voluntary statements to the BLS on March 14, 1991 by Respondent totally contradicting Respondant's trial testimony?

7. Shouldn't have the trial court in the first instance denied Respondent's MOTION TO DISMISS based on facts and the ancient maxim, "[T]hat no man should profit from his own misconduct?"

8. Shouldn't have the N.H. Supreme Court in the second instance granted Petitioners' Notice of Appeal, based on the facts, Extrinsic Fraud, Misrepresentation and Concealment of Material Facts and the ancient maxim, "[T]hat no man should profit from his own misconduct?"

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OTHERS

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2a SUTHERLAND, STATUTORY CONSTRUCTION 57.03 (4th ed. C. Sands 1973)

No. _____

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IN THE SUPREME COURT
OF
UNITED STATES

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OCTOBER TERM 1992

---

Robert F. Smith

&

Joanne M. Smith, Petitioners

vs.

David R. Noyes, Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW HAMPSHIRE SUPREME COURT

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Petitioners, Robert F. and Joanne M. Smith, respectfully pray that a writ of certiorari be issued to review the judgement and opinion of the New Hampshire Supreme Court's refusing to

take an appeal from the lower court requiring that an interlocatory appeal under New Hampshire Supreme Rule (3), based on a Respondant's counter claim using a decision/order from the BLS. This decision/order was made at a reguarly scheduled meeting, not a formal hearing and without notice, by the BLS on May 16, 1991, in violation of the command "Shall," N.H. RSA 310-A:71, and forwarded to Petitioners four months latter by first class mail on Sept. 10, 1991 from Concord, N.H.

RSA 310-A:71 "[A] hearing shall be held on all written complaints received by the board within 3 months of the date of notice of a complaint was received by the accused, unless otherwise agreed to by the parties."

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OPINIONS BELOW

The order/opinion, Respondent's MOTION TO DISMISS, Granted August 18, 1992 by

the State of New Hampshire Superior Court, Rockingham County, Exeter, N.H. is docketed as #92-C-00653 Robert F. Smith, et al., v. David R. Noyes, LLS. and appears as Appendix A to this Petition.

The order/opinion, PETITIONERS' MOTION TO SET ASIDE, Denied Sept. 3, 1992 without a hearing by the State of New Hampshire Superior Court. Rockingham County, Exeter, N.H. is docketed as #92-C-00653 Robert F. Smith, et al., v. David R. Noyes, LLS. and appears as Appendix B to this Petition.

The order/opinion, Oct. 8, 1992, of the New Hampshire Supreme Court and docketed as, 92-563, PETITIONERS' NOTICE OF APPEALL, denied without prejudice, counter claim still to be heard, N.H. Supreme Court Rule 7(1), memo requested

why it should not be dismissed as an improper interlocutory appeal under N.H. Supreme Court Rule (8), and appears as Appendix C.

Second order/opinion of Nov. 18, 1992, New Hampshire Supreme Court and docketed as, 92-563, after memo forwarded consistent with order, denied without prejudice, insisting Petitioners conform to N.H. Supreme Court Rule (8), and appears as Appendix D.

The opinion, May 16, 1991 of The New Hampshire Board Of Licensure For Land Surveyors, Concord, N.H., no docket number, Smith v. Noyes, LLS, dismissing complaint without notice, and without a hearing, and appears as Appendix E.

## JURISDICTION

This Court's jurisdiction is involked under U.S. Sup. Ct. Rule 21, subd., 1(h)

and Title 28 U.S.C.A.; 28 U.S.C.A. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Const. Amends., Amend XIV, section 2, is set forth in Appendix F.

42 U.S.C.A. Sections 1983 is set forth in Appendix G.

42 U.S.C.A. Sec. 1985[2][3] is set forth in appendix H.

New Hampshire RSA 310-A:71 is set forth in Appendix I.

New Hampshire RSA 541-A:21 is set forth in Appendix J.

EXCERPTS EXHIBITS/DOCUMENTS

True photocopy of Letter from BLS chairman on pre-hearing conference, and appears as Appendix L

True photocopy of excerpt from Respondent's testimony VOL VI., Pg.74, court transcripts, 88-E-203, and appears as Appendix M.

True copy of excerpt of Respondent's voluntary statement to BLS, surveyor of record for a boundary line agreement between major abutters, and appears as Appendix N.

Excerpt Respondent's MOTION TO DISMISS WITH COUNTER CLAIMS, May 29, 1992 with BLS decision, accusing Petitioners with abuse of process, etc., and appears as Appendix O.

Excerpt from Petitioners' complaint on issue of "Color of State," and "Color of Law," and appears as Appendix O.

Excerpt from Petitioners' OBJECTION TO MOTION TO DISMISS, U.S.C.A. Sections

1983; 1985[2][3], and appears as Appendix P.

Excerpt from Petitioners' memorandum in response to N.H. Supreme Court's Order of Oct. 8, 1992, and appears as Appendix R.

Excerpt from Petitioners' OBJECTION TO REPONDENT'S MOTION TO DISMISS AND COUNTER CLAIM, appears as Appendix S.

Excerpt from Petitioners' Deed from Inland Acres Assoc.,"John McCrillis Land," and appears as Appendix T.

## STATEMENT OF THE CASE

The State of New Hampshire Supreme Court had jurisdiction pursuant to New Hampshire Supreme Court rule 7(1).

Petitioners filed a complaint against Respondent in Rockingham County Superior Court, Exeter, N.H., Docket #92-C-654, on Feb. 17, 1992, supported by factual

evidence of Extrinsic Fraud, Concealment of Material Facts and Misrepresentation by a voluntary statement made by Respondent at the BLS.

Petitioners' complaint against Respondent requested monetary damages for Extrinsic Fraud, Concealment of Material Facts and Misreprentation for damage to person and property under common law and 42 U.S.C.A. Sections 1983, 1985 [2][3].

On July 20, 1992 a hearing was held at Rockingham County Superior Court, Exeter, N.H. on Respondent's MOTION TO DISMISS with COUNTER CLAIM, using the BLS frudulent decision/order, the motion was granted on Aug. 20, 1992, with the Clerk of Court's notice on Sept. 3, 1992. Respondent's counter claim not dismissed, remaining for a jury trial.

Respondent was the expert witness for all defendants at a trial, Petitioners' PETITION TO QUIET TITLE, 88-E-203, whose testimony is contained in the Court's transcripts VOL VI of Dec. 1, 1988.

Petitioners had used as evidence at trial 88-E-203 Respondent's survey/plan B-5904, a Boundary Line Agreement (herafter agreement) between Respondent's client the Estate of Harold Lewis Fernald (hereafter Estate, and Inland Acres Assoc.,(herafter Inland) our predecessor in title. All documents recorded Rockingham County Registry of Deeds or Probate, Exeter, N.H.

Respondent on the sixth (6th) day of trial, 88-E-203, impeached the agreement, VOL VI., pp. 69 & 74, of trial transcripts, and by doing so implied the two major abutters, his client the

Estate, and Inland, had incorrectly used New Hampshire RSA 472, Sec., 1-4.

VOL VI, pg. 69

Respondent when questioned by the COURT as to his knowledge concerning the major abutters depicted on his plan/ survey and the agreement, remained silent, knowing the opposite to be true, when his clients' legal counsel made the following statement to the COURT:

"...[T]he purpose of all of this examination is for this witness to show that this boundary line agreement made absolutely no determination of the boundary line on the north part of the line because there was no necessity for it."

VOL. VI., pg. 74

"... [a]nd I did not have any part in this boundary line agreement other than producing the survey. The descriptions that appear here were not written by me or not advised by me."

Respondent's voluntary statements to the BLS of his working as the only

surveyor of record for both major abutters, his client the Estate of Harold Lewis Fernald (hereafter Estate), and Inland Acres Assoc., (hereafter Inland) our predecessor in title, on a Boundary Line Agreement, the setting of two iron rods as requested by the legal counsels of both parties.

Unnumbered pages BLS transcripts.

"...Inland Acres with legal counsel, Harold Fernald estate with legal counsel, negotiated and decided to resolve that problem with a boundary line agreement, and they asked me to set two iron rods, which they agreed on, which I did."

Also "... [T]he people that owned the land in the area where the problem was decided how they would they would handle it."

Included in that agreement and owned by Inland was a tract of land known as Tract #7. Within Tract #7 and descript-

ion specific was a portion known as the "John McCrillis Land."

Petitioners purchased the remaining part of Tract #7 remining in Inland's title which included the "McCrillis Land" on August 22, 1986 and recorded on Sept. 15, 1986 Rockingham County Registry of Deeds, Exetern N.H. A portion of that deed states:

"...[t]hence running Easterly by said Fernald land to a fifty (50) acre lot purchased from John McCrillis; ..."

Respondent's clients Fernalds through two (2) sets of interrogatories claimed a portion of Petitioners' land from the estate of John T. Fernald as the "Lovern Fernald Land" by both survey and deed.

Respondent's clients on the fifth (5th) day of a six (6) day trial they disclaimed both survey and deed, blamed

their surveyor, Oliver Wallace, LLS., for a gross error in deed and boundary research and then claimed that portion of land description specific in the agreement and Petitioners deed called the "McCrillis Land."

Respondent remained quiet before trial, during trial, and after trial while his clients were making their claim to ownership of this physical location of land by their sworn interrogatories and while Petitioners were filing a NOTICE OF APPEAL to the N.H. Supreme Court, and at the oral arguments at the appeal hearing, Respondent knowing those claims were false.

Petitioners lost their claim through the lower Court's decision/order and on appeal to the N.H. Supreme Court, April

21, 1991, 134 N.H. Smith v. Wedgewood Builders Corp., et al, 129-30, and by those decisions a extremely valuable piece of land, the "McCrillis Land" to Respondent's clients.

Petitioners also had to pay Atty's Fees, Expert Fees and Costs to Respondent's clients of $16,791.55. Of those payments $7,442.45 went to Respondent.

Petitioners' filed a MOTION TO SET ASIDE AND RELATED RELIEF, which was denied by the trial court on Sept. 3, 1992 without a hearing.

Petitioners filed a timely appeal to the State of New Hampshire Supreme Court which was denied on Oct. 8, 1992 without predjudice requesting a memorandum as to why Petitioners should not have to file a motion for an interlocatory appeal

under N.H. Supreme Court Rule (3) to the trial court, based on Respondent's counter claim using the BLS fraudulent decision'order, being void because of failure to follow statutory law, and which had no merit as presented to the trial court in Petitioners' OBJECTION TO PETITIONER"S MOTION TO DISMISSS and also for the record which was kept at the motion hearing.

"Defendant's COUNTERCLAIM is without merit as the Board in its written opinion states:

It is not clear to this Board that an abutter or abutters are identified along the entire southerly line of the property."

27. "Since this interpretation is key to Mr. Smith's complaint, The Board believes that pursuit of this matter through a full disciplinary proceeding is not warranted.

28. The Board's explaination fully and uncontrovertible describes

negligence on the part of defendant, failure to follow the Board's and Association's "STANDARDS." Defendant failed to show a major abutter, Inland Acres. Assoc., by name and deed recordation.

29. For whatever reason the Board in its Quasi-Judical capacity chose to ignore the law and defendant's breach of standards and its own duty of care to the public.

Petitioners complied with the N.H. Supreme Court's request and promptly forwarded a memorandum citing that the counterclaim, as we had also done in the trial court was void, that a hearing as required by New Hampshire RSA 310-A:71 had not been held and the decision/order as the BLS failed to follow the legal requirements as worded in the statute consistant with its own opinion 120 N.H. In re Russell C. 261, 262, which cites as a standard 295 US ESCOE v. ZERBST, WARDEN 490 . Therefore Respondent's

counter claim had no merit, excerpt

memo:

14. New Hampshire RSA 310-A:71 explicitly commands the State's Board to have a formal hearing, "... [A} hearing "shall" [OUR EMPHASIS] be held on all written complaints..."

15. This Court has on numerous occaassions in its opinions and rulings directly confronted the intent of the legal or statutory meaning of "shall" as written into the construction of the statute.

16. In 120 N.H. In Re Russell C. at 264, the following was said "...the [S]tate argues that a liberal interpretation would not be inconsistent with the purposes of the statutes. It further argues that the statutorily prescribed time limits are procedural and not jurisdictional in nature, and that a failure to comply is procedural error not requiring reversal absent a misscarriage of justice. WE DISAGREE( OUR EMPHASIS).

17. Also in In Re Russel C. at 264; the court further amplifies its opinion by the following statement, " ... The use of the word "shall" is generally regarded as a command; although not controlling, it is significant as indicating the intent that the statute is mandatory. Escoe v. Zerbst 295 U.S. 490. 493 (1935); E. Crawford, Statutory

Construction Sec. 262 (1940); [other citations omitted] ... " This is especially so where the purpose of the statute is to protect private rights." Other cited cases as to "shall". 121 N.H. Appeal Concord Natural Gas Corp. 685; 122 N.H. New Hampshire-Vermont Health Service v. Commissioner of Ins., 268.

The N.H. Supreme Court denied again on Nov. 18, 1992 Petitioners' NOTICE OF APPEAL, without predjudice Petitioners' insisting Petitioners file a motion for an interlocutory appeal, N.H. Supreme Rule (3) or wait until a trial is held on the merits of Respondents counter claim.

Petitioners feel this is an unreasonable request based on the facts and records/evidence as it would waste time, money, and energy, based on the N. H. Supreme Court's own opinions, In re Russell C. 261, 262, which cites as a standard 295 US ESCOE v. ZERBST, WARDEN

490 concerning the legislative intent of the command "shall."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: (A) This petition presents an issue which has been complicated by the BLS failure to follow "Statutory Law," New Hampshire RSA 310-A:71 as to hearing of a written compaint against Respondent; (B) The safeguards given by the BLS chairman to Petitioners concerning a pre-hearing confererence, that the hearing would in no way interfer with Petitioners' constitutional and statutory rights to equal protection and due process under law and a formal hearing; (C) The BLS dismissal of that complaint despite the safeguards given by the BSL and without notice; (C) The BLS promulgation of that

fraudulent decision/order to other courts and public in an unlawful manner, N.H. RSA 541-A:21, with the intent to damage Petitioners; (D) that two New Hampshire state courts the lower court and Supreme Court have ignored a question settled by this Court and in a way that conflicts with applicable decisions of this Court and; (E) that this case is of such importance and is in the interest of justice and the public welfare, and represents a justifiable deviation from normal appellate practice and requires immediate settlement in this Court.

This Court has implicity held that such quasi-judicial action is wrong on the part of the BLS based on the intent of the law as expressed in N.H. RSA 310-A:71 and U.S.C.A. Amend. XIV, subd.

2, failure to provide equal protection under law and due process. In ESCO v. ZERBST, WARDEN 295 U.S. 494 (1935), this Court stated:

"...Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect. French v. Edwards, supra; Lyon v. Alley 130 U.S. 177, 185; Erhardt v. Schroeder, 155 U.S. 124, 128, 130." ..." [W]hen an opportunity to be heard is denied altogether, the ensuing mandate of the court is void ... (our emphasis)"

The New Hampshire Supreme Court has held in its own opinions as to the statutory intent of the command "shall" Corson v. Brown Products, Inc, 119 N.H. 20, 23, 397 A.2d 640, 642 (1979); UNITED STATES vv. SANCHES, 574 F 505, 507 (10th Cir. 1978) and in its opinion in re Russell C. 120 N.H. 263, 264 (1980) stated:

"[T]he State argues that the use of the word "shall" in RSA 169-B:14 II (Supp. 1979) and RSA 169-D:13 II (Supp. 1979) is intended to be directory and not mandatory. While conceding that the statutory provisions "appear to set mandatory time limits on the holding of the adjudicary hearing," the State argues that a literal interpretation would be inconsistant with the purpose of the statutes. It further argues that the statutorily prescribed time limits are procedural and not jurisdictional in nature, and that a failure to comply is procedural error not requiring reversal absent a miscarriage of justice(our emphasis). We disagree."

Respondent's counter claim not only uses the fraudulent decision/order but would hide his misconduct behind the the statutes of limitation by claiming Petitioners should have filed our complaint within three years of his testimony or Dec. 1, 1988. It was not until his voluntary statement to BLS that Petitioners fully understood the critical information Respondent had

concealed in his heart at trial to support his clients' claims.

This Court opinions on the desirability as a matter of public policy of estopping a defendant from pleading the statutes of limitations when timely action has been delayed because of fraud, misrepresentation or deception could be summed up in Glus v. Brooklyn Eastern Dist. Terminal (1959) 359 359 U.S. 232, 3 L Ed 2d 770, 79 SCt 760 wherin this Court Stated:

"[T]o decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of case by both law and equity courts and has been frequently been employed to bar inequitable reliance on statutes of limitations..."

Also this Court also states: ..."It may well be that petitioner's complaint as now draw is too vague, but that is no ground for dismissing his action, Cf. Conley v. Gibson, 355 U.S. 41, 47-48. His allegations are sufficient for the

present. Whether petitioner can in fact make a case calling for application of the doctrine of estoppel must wait for trial."

This Court in denying certiorari Scarborough v. Atlantic Coast Line Railroad Co., (1949 CA4 Va) 178 F2d 253, 15 Alr2d 491, 339 US 919, 94 L Ed 1343, 70 S Ct 621 supported the appellate court in reversing the lower court decision concerning the differ- ences between the ordinary remedial type of statute of limitations and the substantive type. Those opinions were summarized in 43 ALR3d 459 as follows:

"...[b]ut the appellate court, in reversing the lower court, stated that the ancient maxim that no one should profit by his own conscious wrong was deeply embedded in the framework of law to be set aside by legalistic distinction between the closely related types of statutes of limitations, and held that the fraud set out in the complaint operated to extend the period within which an action had to be brought on a claim arising under the statute".

Petitioners had requested monetary damages under comman law and 42 U.S.C.A. Sections 1983, 1985 [2][3] but more particuarily Sec. 1983.

Petitioners in their objection to Respondents MOTION TO DISMISS cited as a standard IHRKE v. NOTHERN STATES POWER CO., 459 F.2d 566 as to Respondant and The New Hampshire Land Surveyors Assoc., as performing their professional duties under "State Action" as intended by the New Hampshire Legislature, N.H. RSA 310-A:53[1] for the BLS to be held responsible for the "safeguard of property in the public interst."

The court stated in IHRKE as follows:

"...[I]t may be possible to demonstrate that a privately-owned publicaly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be

considered are whether 1) the entity is subject to close regulation by a statutorily created body (such as the Illinois Commerce Commission), 2) the regulations filed with the regularitoy body are to be filed as a condition of the entities operation, 3) the regulations must be approved by the regulatory body to be effective, 4) the entity is given total or partial monopoly by the regularity body, 5) the regulatory body controls the rates charged and/or specific services offered by the entity. 6) the actions of the entity are subject to review by the regulatory body, and 7) the regulations permits the entity to perform acts which it may not otherwise perform without violating state law."

Petitioners in the objection to Respondent's MOTION TO DISMISS and consistent to to the above outline placed on the record as follows:

"Defendant as a memember of the Asscciation comes directly under the Color of State Law as follows: (A) The Association has been granted by the State of New Hampshire, University of New Hampshire to use a State building as

its legal place of business; (B) THE BOARD exercising its authority under RSA 310 has the legal right to review the Associations Ethics and Standards and as a matter of law adopts the "standards" as part of the Board's administrative rules; (C) The Association has to submit changes in its rules and regulations, Ethics and Standards to which each individual licensed land surveyor must conform to; (D) The Board has the right to discipline the surveyor for breach of the Board's and Association's standards, see plaintiffs' affidavit exhibit 3."

This Court should grant certiorari here to explicitly rule (A) that this Court's opinion ESCO v. ZERBST, WARDEN 295 U.S. 494 (1935) voids Respondent's counter claim; (B) that the issues set forth in the Petitioners' original

complaint at the trial court of alleged Extrinsic Fraud, Concealment of Material Facts, Misrepresentation are supported in fact by the court's records, transcript VOL IV, 88-E-203 of Dec. 1, 1988 and Respondent's voluntary statement to the BLS on March 14, 1991; (C) that Petitioners' complaint of Feb. 17, 1992 against Respondent is consistent with New Hampshire RSA 508:4 [1]; (D) that this case is of such importance and is in the interest of justice and the public welfare, and represents a justifiable deviation from normal appellate practice and requires immediate settlement in this Court; and (D) should be remanded to the trial court to be heard.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of The New Hampshire Supreme Court in this matter.1/

Dated: February 16, 1993

Respectfully submitted,

Robert T. Smith pro se

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1/ If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to The New Hampshire Supreme Court for redetermination in light of this Court's opinions ESCOE v. ZERBST, WARDEN, supra, and the New Hampshire Supreme Court In re Russell, C., supra.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

ROCKINGHAM COUNTY AUGUST 18, 1992

RE: 92-C-00653

NOTICE OF DECISION

Smith, Robert F. etal vs. Noyes, LLs, David R.

Please be advised that on August 18, 1992, the Court(____), Esq., Master; Gray, J.) made the following order on the Motion To Dismiss.

" Motion Granted, Plaintiff's claims are either barred by the Statutes of Limitations, failed to show any duty owed to Plaintiff or, with respect to 42 USCA 1983 etc., claims do not allege "STATE ACTION."

APPENDIX A-1

Raymond W. Taylor, Clerk

Administrative and Justice Bldg.

One Hampton Road

Exeter, New Hampshire 03833-4823

RWT/jb

Robert F. Smith

PO BOX 83

Nottingham, NH 03290

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

ROCKINGHAM COUNTY September 03 1992

RE: 92-C-0065#

NOTICE OF DECISION

Smith, Robert F. etal vs. Noyes, LLs, David R.

Please be advised that on August 18, 1992, the Court(____), Esq., Master; Gray, J.) made the following order on Plaintiffs' Motion To Set Aside & Related Relief. (Statement of "Motion denied".

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Raymond W. Taylor, Clerk

Administrative and Justice Bldg.

One Hampton Road

Exeter, New Hampshire 03833-4823

APPENDIX B-1

Tel: (603) 772-3714

Tel: (603) 778-8508 (Domestic Relations

RWT/rcw

Joanne Smith

cc: Smith Robert F

Whittum, Donald F

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 92-563 Robert F. Smith & a. v. David R. Noyes, LLS the court upon October 8, 1992 made the following order.

Rule 7(1) of the Supreme Court Rules requires that notice of appeal be filed after a decision on the merits. Rule 3 defines decision on the merits as including an order, verdict, opinion, decree, or sentence following a hearing or trial on the merits. Rule 3 defines interlocutary appeal as appellate review of rulings adverse to a party, before a final decision decision on the merits in a lower court. The order being appealed in this case grants defendant's motion to dismiss, but does not address

defendant's counterclaims (see Appendix to Plaintiff's Notice of Appeal at 19-21). Therefore, the order being appealed may not be a decision on the merits because it does not conclude these proceedings in the superior court.

On or before October 23, 1992, the plaintiffs shall file a brief memorandum stating why this appeal should not be dismissed as an improper interlocutory appeal. Screening of the appeal shall be held in abeyance pending a response from the plaintiffs. The plaintiffs may voluntarily withdraw the appeal without predjudice and seek trial court approval of an interlocutory appeal from ruling puruant to Supreme Court Rule 8.

APPENDIX C-2

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 92-563 Robert F. Smith & a. v. David R. Noyes, LLS the court upon October 8, 1992 made the following order.

Plaintiffs' notice of appeal is declined, see Rule 7(1), without prejudice to raising the issues in a subsequent appeal either upon conclusion of the entire case in superior court or by a properly filed interlocutory appeal in accordance with Rule 8.

Distribution:

Rockingham Superior Court, 92-C-00653

Mr. Robert F. Smith

Honorable Douglas Gray

Donald Whittum, Esq.

Theresa H. Hayes, Supreme Court

File

Howard Zibel, Clerk

APPENDIX D

STATE OF NEW HAMPSHIRE

BOARD OF LICENSURE FOR LAND SURVEYORS

IN THE MATTER OF

Robert Smith vs. David Noyes

On March 14, 1991, a pre-hearing conference was held at the Joint Board offices located at 57 Regional Drive, Concord, New Hampshire, relative to a complaint filed by Robert Smith against David Noyes, LLS. The nature of the complaint was determined to come under New Hampshire Code of Administrative Rules, part 502, section Lan 502.01, 502.02 and 502.3, sections relative to proper research procedures; and secondarily, a question of unprofessional conduct as outlined in RSA 310-A:70 II. The first part of the complaint addresses information shown on a survey plan prepared by Mr. Noyes in 1976 and subsequent testimony in court

in 1988. The second part of the complaint addresses alleged comments made by Mr. Noyes.

The Board has considered information presented prior to and discussed at the pre-hearing conference. At a regularily scheduled meeting of the Board on May 16, 1991, the complaints were discussed and action taken as follows;

Part I Section Lan 502.01, 502.02, 502.03-

This complaint concerns the interpretation of a plan prepared by Mr. Noyes in 1976 and the allegation that information shown on his plan was contradicted by subsequent testimony provided by Mr. Noyes in court.

The Board has examined a copy of this plan and does not agree with Mr. Smith's interpretation. It is not clear to this Board that an abutter or abutters are identified along the entire southerly line of the property.

Since this interpretation is key to Mr. Smith's complaint, the Board believes that pursuit of this matter through a full disciplinary proceeding is not warranted. This complaint is dismissed.

Part II RSA 310-A:70 II - Unprofessional Conduct

This complaint concerns statements alleged to have been made by Mr. Noyes to a contractor in the employ of Mr. Smith. This complaint is based upon statements as reported to Mr. Smith. The alleged statements were neither directed toward Mr. Smith nor made in his presence.

Since this constitutes hearsay information, the Board believes that pursuit of this matter through a full disciplinary hearing has no basis. This complaint is dismissed.

The above actions were taken by unanimous vote of the Board at their meeting on May 16, 1991. Board members in attendance were: Robert J. Carpenter, Chairman; Melvin E. Jenkins; John G. Kelly; and Judith A. MacDonald.

## AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 2. All persons born or naturalized in the United States, and are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor delay to any perso within its jurisdiction the equal protection of the laws.

42 U.S.C.A. Sec. 1983

Any person who under the color of any statue, ordinance, regulation, custom or usage of any State or Territory subjects any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

APPENDIX G

[2], " If two or more persons in any State or Territory conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therin, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering,

obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the the laws, or to injure him in his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of person, to equal protection of the laws.

[3] last statement: ;... in case of conspiracy set forth in this section; if one or more persons engaged therin do, or cause to be done any act of furtherence of the object of conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have action ocassioned by such injury or deprivation, against any one or more of the conspirators.

NEW HAMPSHIRE RSA 310-A:71

310-A:71 Hearings. The board shall take no disciplinary action withour a hearing. At least 14 days prior to hearing, both parties to a disciplinary proceeding shall be served, either personally or by registered mail, with a written copy of the complaint filed and notice of time and place foe hearing. All complaints shall be objectively received and fairly heard by the board, but no complaint shall be acted upon unless in writing. A hearing shall be held on all written complaints received by the board within 3 months of the date notice of complaint was received by the accused, unless othwise agreed to by the parties. Written notice of all disciplinary decisions made by the board shall be given to both parties to proceeding upon the issuance. Orders of

the board shall be subject to rehearing and appeal in the manner prescribed by RSA 541.

NEW HAMPSHIRE RSA 541-A:21

541-A:21 Ex Parte Communications. Unles required for the disposition of ex parte matters authorized by law, officials or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue before the agency, with any person or party, except upon notice and opportunity for all parties to participate. This notice requirement shall not apply to:

1. Communications between or among agency personnel, or between the agency and legal counsel; or

2. Communications between or among the presiding officer and one or more personal assistants.

APPENDIX J

N. H. RSA 508:4

508:4 Personal Actions

1. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not be reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of. [Amended 1986, 227:12, eff. July 1, 1986]

STATE OF NEW HAMPSHIRE

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Joint Board of Licensure and

Certification

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February 8, 1991

Robert F. Smith

Old Gile Road, PO Box 83

Nottingham, N.H. 03290

Dear Mr. Smith:

The Board is in receipt of your letters dated February 22 & 27, 1990 and January 22, 1991 stating your complaint against David Noyes relative to N.H. Statute and Code of Administrative Rules. The Board has reviewed your letters and proposes to process your complaint acknowledging you as complainant.

To this end the board has scheduled a pre-hearing conference in this matter to take place at its offices at 57 Regional

Drive, Concord, N.H. on March 14, 1991 at 3:30 P.M. 30 minutes has been allowed for this conference.

The following matters will be considered at the pre-hearing conference.

1) simplification of the issues in the proceeding;
2) stipulations or admissions as to issues of fact or proof by consent of the parties;
3) changes to standards procedures desired having any bearing on this matter by consent of the parties;
4) consolidation of examination of witnesses by the parties at hearing of this matter;
5) offers of settlement
6) any other matters that may aid in the disposition of this proceeding;

No formal testimony will be taken at this conference and any statements that you make will be without prejudice to your ability to proceed to a formal hearing on this matter.

As complainant, you will be expected to be present to state your complaint against Mr. Noyes and to address such matters as stated above as may be appropriate. Failure to personally attend the pre-hearing conference to present your case may constitute default and may lead to the Boards dismissal of your complaint.

Thank you for your attention.

Sincerely,

Robert J. Carpenter, LLS

Chairman

57 Regional Dr., Concord, N.H. 03301

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The reason that the survey was done.

Q Sir, you represented the estate of Harold Fernald with respect to this survey, correct?

A. That's correct. My client at that time was Harold L. Fernald estate.

2Q. And you certainly wanted your client to be fully protected and to obtain the signatures of any necessary abutters for that boundary line, correct?

A. I left that to the attorneys who were doing the paper work.

Q. You deferred to the attorneys?

A. Wait, wait, wait. Just a minute. I presented the problem that I saw to the land owners and told them it needed to be solved, and I shiwed on my plan the physical evidence that's called for in the deeds, the physical occupation or

physical indication of possession, and I did not have any part in this boundary line agreement other than producing the survey. The descriptions that appear here were not written by me or not advised by me.

Q. Sir, didn't you forget to tell the Court one part of your analysis that you did with respect to this 1976 survey was that you did a traverse of the McCrillis lot at that time?

A. Yes, we did. Because it was shown on the plan, and I gave my field crew instructions to go out there and to find all

THE COURT: I guess the magic question is why weren't the Fernalds signators to the boundary line agreemen?

Q: Right, and it was my understanding that this was removed from the case and everybody has the locuses nailed down, but I'm persuimg this now because it seems to have arisen here late this afternoon.

MR. DONOVAN: Wait. I don't want this to creep in. I don't want this to have any indication of anything different than the parcel that my clients claim is the parcel we've been telling Mr. Townsend that we have been claiming for a long time now. The purpose of all of this examination is for this witness to show that this boundary line agreement made absolutely no determination of the

boundary line on the north part of that line because there was no necessity for it.

MR. TOWNSEND: Objection, your Honor. That's pure argument. That's going to the legal conclusions for the Court.

THE COURT: I'll hear it. As I understand it, the parties do not disagree that the Fernald

Smith- Okay, I realize what you are saying, but we're wasting time by expanding beyond what the complaint is about.

Carpenter- I think that this is to your benifit to be aware of what he intends produce for evidence and this is for your benefit not for ours.

Smith - He brought up Mr. Garlands name, he will be a witness I will require too.

Carpenter - Very good, continue Dave.

Noyes - Where was I, well Mr. Smith has taken something out of the court record out of context, a small portion of it, and is trying to use that in a twisted way. He does't want to allow me to use the same court record to show what the facts are, he continually objects to what I'm trying to do. I have a right to bring those facts in front of

you for consideration, that's what I'm trying to do. I'll continue, his two experts if given the opportunity to meet with myself and Paul Durgin for people in the area that have done substantial work, many of the issues at work finally wound up at court could have been resolved and his cost, which he talks about would have been substantially less and everybody elses cost would have been substantially less. Also, a letter from Richie Ladd which is included in there recently written, states that if had done the survey which is indicated as being 5904, he would come up with the same thing. It's based on deed description that is very good.

Carpenter- I guess I'm at a point where I not seeing how the pieces fit in, maybe that will become clear at a latter date. You have expanded quite a bit beyond what appears to be the nature

of the complaint is. Your evidence may provide clarity in that respect. But, if you feel it germane I would ask you to contiue to list it.

Noyes - It's there in the report, and I'm just trying to summarize.

Carpenter - Okay, fine.

Noyes - My drawing number 7539A which is recorded at the registry of deeds is B5904 is a physical evidence survey, states that on the face of the survey. In a way of explanation of how that survey was done, the first version was finished October of 1975, it showed cemeteries, roads, stone markers, stone walls, which clearly matched the deed description of Harold L. Fernald. It also showed the physical evidence that I found in addition to the stone walls and the stone markers that were mentioned in the deed, and that was stone walls, wire fences and trees with wire ingrown.

Which are clear evidence of occupation and physical possession. Those are shown on the plans. During the annalists of the deeds that I looked at and the field for physical evidence I found I discovered there was a problem, in that there were two survey done for Inland Acres that over lapped onto the Harold Fernald tract. I informed the Harold Fernals Estate people through Archie Fernel, of the problem and indicated that it needed to be resolved. Which he and his sister pursued.

Kelly - This was a result of your search?

Noyes - Yes, they came back to me and asked me to explain the problem to Inland Acres, which I did. Inland Acres with legal council, Harold Fernel with legal council, negotiated and decided to resolve the problem with a boundary line

agreement, and they asked me to set two iron rods, which they agreed on, which I did. At that time the Nottingham tax map showed the Harold Fernel piece running down Batchler Road a much greater distance than my survey showed. The deeds in Harold Fernel estate called for a specific amount of road frontage, comes out nearly, precisely what my survey shows. There are objects that are on the ground that are called for in that deed which were easy to find. Which were found. And I submit to you the surveys by Drew Chesley and Waed Williams which are in error and on those surveys outlined in red is approximately are the overlap.

Kelly - Could you repeat that again, could you repeat that line.

Noyes - On those two plans, one by Chesly and one by Ward Williams. The areas marked out in red, the red is my doing to show where the overlap was. Where the overlapping is between Harold Fernel estates and what was claimed on these surveys. The small plan that you have there doesn't have any of the red indications on it.

Kelly - Right, but were you aware of the overlap at the time of recording of the map? But it doesn't depict it.

Noyes - Yes, but it does't depict it. The people that owned the land

Noyes - in the area where the problem was decided how they wanted to handle it.

Kelly - Okay, and the overlap would have incorporated some of the land depicted on this plan.

Noyes - Yes it does.

Kelly - Okay.

Noyes - I have included in there a copy of the February 29, 1972 Standards and Ethics for the New Hampshires Land Surveyors Association, and state that my plan exceeds the standards, greatly exceeds the standards of practice at the time. I also state that if Mr. Smith has concluded that a physical evidence survey only depicts physical occupations he is mistaken and similarily he has concluded that my survey showed only physical occupations he is mistaken. I refer you to the standards and ethics.

Carpenter - We open momentarily to Mr. Smith.

Smith - No, I'm not objecting. I'm saying we never objected to his survey only to that one boundary line. We never objected to the physical location of the survey just to that one boundary line. Being his opinion what is the intent of that boundary line nothing else, one singular line.

property.

B. That the Plaintiffs sent copies of the complaints to numerous individuals including the Governor, Governors legal counsel, the U.S. Attorney, the Federal Bureau of Investigation, WHDH Channel 7, and others.

C. That on or about September 10, 1991 the Board promulgated a written opinion that the complaints against the Defendant had no merit and dismissed the complaints.

D. The Plaintiffs have engaged in and are continuing to engage in a course of conduct which is designed to annoy, intimidate, embarass and otherwise harass the Defendant.

E. That the actions of the Plaintiffs in pursuing their aforementioned course of conduct have

caused the Defendant great stress, emotional pain and suffering, and monetary expenses.

COUNT II- ABUSE OF PROCESS

1. That on March 14, 1991 a pre-hearing conference was conducted by the Boatd of Licensure for Land Surveyors on complaints filed by Plaintiffs with the Board on February 27, 1990 and on October 23, 1990.

2. That on or about September 10, 1991 the Board unanimously promulgated its decision finding no professional misconduct on the part of Defendant and dismissing the Plaintiffs' complaints.

3. That the decision of the Board constituted an "order" within the meaning of RSA 310-A:71 and, as was "subject to rehearing and appeal in the manner prescribed by RSA 541."

4. The Plaintiffs have failed to follow the procedure set forth in RSA 541 for rehearing and appeal set forth therein.

5. The Defendant believes and avers that the Plaintiffs have not brought the within action for the purpose of righting any alleged wrong committed by the Defendant, but rather for the purpose of intimidation, annoying, and harassing the Defendant and causing him legal expenses.

6. That the failure of Plaintiffs to follow the statutory appeal procedure and the bringing of the within action constitutes an abuse of process. For this the Defendant is entitled to attorney's fees and costs.

COUNT III-FRIVOLOUS ACTION

The Defendant repeats each and every

legation contained in Counts I and II above and further says that because the Plaintiffs' complaint fails to state a cause of action against the Defendant, pursues a claim which is barred by the Statute of Limitation, and fails to follow the appeals procedure

10. Defendant's statements to the Board were affirmed on Oct. 25, 1991 by the THE STATE OF NEW HAMPSHIRE'S OFFICE OF ATTORNEY GENERAL, see plaintiffs' affidavit _____.

11. Defendant as a Licensed Land Surveyor and "Under Color of State Law," New Hampshire RSA 310-A:54 II, knew as a reasonable person would know that by his testimony at trial plaintiffs could be deprived of their property, plaintiffs were deprived of their property, the McCrillis Lot.

Count I

(concealment of material facts, misrepresentation)

12. Defendant before trial, through discussions with plaintiffs' experts between Dec. 1987 and Aug. 2, 1988 and at defendant's deposition taken on Sept. 12, 1988 fully intended to and did

conceal critical material facts that only defendant would know about his Plan and the Agreement at the time of the Plan and the Plan's recordation April 27, 1976, supra _____.

17. 42 U.S.C.A Section 1983 is specific in the issue of "personal involvement" prerequisite under section 1983 and such a test is consistent with the language of the statue itself, which reads:

" Any person who under the color of any statue, ordinance, regulation, custom or usage of any State or Territory subjects any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

18. The privileges and immunities are well defined in the U.S.C.Amends., Amend 14, denying any State the right to abridge the privileges and immunities of

its citizens to be secure in person and property.

19. Plaintiffs' complaint stresses that we were denied those rights by defendant's misconduct, the reckless disregard and indifference to plaintiffs privileges to be secure in person and property. Because of defendant's misconduct plaintiffs suffered the loss of their property the McCrillis Land.

20 42 U.S.C.A section 1985[2], does not require the presence of State Action but takes into consideration that form of interference with plaintiffs' rights by a "civil conspiracy."

1985[2] " ...or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any State or Territory,

with intent to deny any citizen the equal protection of the the laws, or to injure him in his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of person, to equal protection of the laws; ... in case of conspiracy set forth in this section; if one [our emphasis] or more persons engaged therin do, or cause to be done any act of furtherence of the object of conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have action ocassioned by such injury or deprivation, against any one [our emphasis] or more of the conspirators.

16. In 120 N.H. In Re Russell C. at 264, the following was said "...the [S]tate argues that a liberal interpretation would not be inconsistent with the purposes of the statutes. It further argues that the statutorily prescribed time limits are procedural and not jurisdictional in nature, and that a failure to comply is procedural error not requiring reversal absent a misscarriage of justice. WE DISAGREE ( OUR EMPHASIS).

17. Also in In Re Russel C. at 264; the court further amplifies its opinion by the following statement, " ... The use of the word "shall" is generally regarded as a command; although not controlling, it is significant as indicating the intent that the statute is mandatory. Escoe v. Zerbst 295 U.S. 490, 493 (1935); E. Crawford, Statutory Construction Sec.

262 (1940); [other citations omitted] ... " This is especially so where the purpose of the statute is to protect private rights." Other cited cases as to "shall". 121 N.H. Appeal Concord Natural Gas Corp. 685; 122 N.H. New Hampshire-Vermont Health Service v. Commissioner of Ins., 268.

18. The history of legislative law concerning the profession of land surveying chapter 319-A:1[I] (formerly House Bill 441) now NH RSA 310-A:53 [I], provided adequate insight into both the objectives and intent underlying its enactment into law, to regulate the practice of land surveying in order to safeguard property in the public interest ( see Notice of Appeal Appendix pg. 161).

19. The State's Board with defendant's knowledge made a decision on

May 16, 1991 knowing the state of the law NH RSA 310-A:71, violated plaintiffs federally protected rights, U.S.C.A. Const. Amend 14 and 42 U.S.C.A. Sec. 1983 rights. Also the CONSTITUTION OF THE STATE OF NEW HAMPSHIRE, Pt. 1, Art. 15, Sec IX, LAW OF THE LAND, DUE PROCESS, subd. 414;

"... the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time amd in a meaningful manner."

Also, "...[A] fundamental requirement of the constitutional right to be heard is notice of the impending action that affords the party an opportunity to protect the interest through the presentation of objections and evidence." cited cas 130 N.H. Appeal of Concord Steam Corp. (1988) at 422, 453.

20. Defendant as a reasonable person should have know that this action was a direct violation of plaintiffs'

26. That defendant intentionally under "Color of State' deprived plaintiffs of their 14th Amend. rights.

27. Defendant's COUNTERCLAIM is without merit as the Board in its written opinion state:

"it is not clear to this Board that an abutter or abutters are identified alon the entire southerly line of the property."

"Since this interpretation is key to Mr. Smith's complaint, the Board believes that pursuit of this matter through a full disciplinary proceeding is not warranted."

28. The Board's explanation fully and uncontrovertible describes negligence on the part of defendant, failure to follow the Board's and Association's "STANDARDS." Defendant

failed to show a major abutter, Inland Acres. Assoc., by name and deed recordation.

29. For what ever reason the Board in its Quasi-Judicial capacity chose to ignore the law and defendant's breach of standards and its own duty of care to the public.

WARRANTY DEED

That, INLAND ACRES ASSOCIATES A New Hampshire Limited Partnership, having a place of business at Route 28, Center Barnstead, County of Belknap, State of New Hampshire, for consideration paid, grants to ROBERT F. SMITH and Joan M. Smith, husband & wife, as joint tenants with rights of survivorship, both of Old Gile Road, P.O. Box 83, Nottingham, County of Rockingham, State of New Hampshire, WITH WARRANTY COVENANTS,

A certain parcel of land situated in said Nottingham, County of Rockingham, State of New Hampshire, being more particuarily bounded and described as follows, viz:

Beginning at the intersection of the Northerly side line of the Old Gile Road with the Westerly side line of the main road, sometimes called the

McCrillis Road, and thence running Westerly by the Old Gile Road to the land of Perly B. Batchelder; thence running Northerly by said Batchlder land to land of Harold Fernald; thence

APPENDIX S-1

running Easterly by said Fernald land to a fifty (50) acre lot purchased from John McCrillis; thence running Northerly by said fifty acre lot to a road; thence running Easterly by said road to land of John McCrillis; formerly of John Gile; thence running Easterly by land of John McCrillis to the main road; sometimes known as the McCrillis Road; thence running Southerly by the McCRillis Road to the Old Gile Road at the point of beginning.

The above property consists of about one hundred and forty-five (145) acres.

APPENDIX T-2